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Demand for Documents Smear Tactic in Disguise

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Editorial
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When executive branch lawyers write legal memorandums for policymakers, should they be written to deliver the best possible legal advice or couched in the pre-emptive cringe language an ambitious lawyer might use in anticipation of someday being brought before a Senate confirmation hearing? Unvarnished legal advice is, of course, the better choice. But a document fishing expedition suggested by Sen. Charles Schumer, D-N.Y., would undermine the executive branch's ability to obtain strong legal advice.

Schumer wants to get his hands on internal Justice Department legal memoranda written by Judge John Roberts Jr. while he was a government lawyer. Such memoranda long have been regarded as privileged from disclosure, and Schumer surely knows that. Both Democrat and Republican presidents have refused to allow such fishing expeditions through legal files, which is exactly the proper stance to protect not only the constitutional separation of powers but also the sound operation of government. Lawyers must be free to speak or write frankly to their clients, in this case senior policymakers of executive branch agencies.

Schumer and his hyper-partisan brethren have used this tactic before to sink judicial nominations, most notably of Miguel Estrada, who was rejected for a lower court nomination because Schumer and company don't think a Hispanic should be allowed to hold conservative views. The game goes something like this: Senate partisans demand to see legal memoranda on such-and-such a subject. The executive branch refuses, declaring legal and executive privilege. Partisans then claim that something damning must be

hidden in those memos, and the nominee is torpedoed for refusing to answer "serious questions." It's a tactic very much in league with Sen. Joe McCarthy's empty envelope.

The Bush administration undoubtedly will refuse to open its legal files for a partisan fishing expedition in search of some supposedly inflammatory memo. When that refusal comes, it should be accompanied by a little education about why legal and executive privilege are necessary. Schumer's partisan games degrade the Senate and his tactics should be exposed for what they are: bald attempts to tar any nominee of the opposing party.

Senator Hatch, Floor Statement, 7/28/05

Mr. President, the nomination of Judge John Roberts to the Supreme Court presents the Senate with some real challenges and opportunities.

First, it allows us the specific opportunity to place on our nation=s highest Court a man of impeccable qualifications and unquestioned character.

After an unprecedented degree of consultation with the Senate, President Bush has nominated a truly outstanding individual.

Judge Roberts has a strong background in terms of education and experience.

Judge Roberts is a *summa cum laude* graduate of Harvard College – a degree which he finished in just three years – and a *magna cum laude* graduate of Harvard Law School, where he was the managing editor of the Harvard Law Review.

He was a law clerk for two distinguished federal judges: first for the late Judge Henry Friendly on the U.S. Court of Appeals for the Second Circuit, widely recognized as one of the most influential appellate judges of his time; and next on the U.S. Supreme Court for then-Associate Justice William Rehnquist. Now Chief Justice, he too is one of the most outstanding jurists of his time.

Judge Roberts' career in legal practice covers both the public and private sectors.

He held several positions in two administrations, including Special Assistant to the Attorney General, Associate Counsel to the President, and Principal Deputy Solicitor General.

In between his stints in public service, Judge Roberts became a leading member of the prestigious law firm of Hogan and Hartson.

Overall, Judge Roberts became, by all accounts, one of the leading practitioners before the Supreme Court, arguing nearly 40 cases.

Not only does Judge Roberts have the education and experience, but his colleagues in the bar tell us that he possesses the integrity and character to make a fine member of the Supreme Court.

Just two years ago, the American Bar Association unanimously gave Judge Roberts its highest *well qualified* rating for serving in his current position on the U.S. Court of Appeals for the D.C. Circuit.

Mr. President, a second opportunity, as well as a great challenge, presented by this nomination is more general.

We can better educate ourselves and our fellow citizens about the proper role of judges in our system of government.

We can clarify the kind of judge we need on the bench.

We can get straight just what judges are supposed to do.

We must seize this opportunity, because I am concerned that lack of clarity on this point, a misunderstanding of what judges are supposed to do, contributes to the rancor and the partisan conflict surrounding the judicial selection process.

Mr. President, last week here on the Senate floor, I began to address this by comparing judges to umpires or referees.

I used that analogy because I believe we can be simple without begin simplistic, even regarding some of these very important and sometimes confusing matters.

Judges, like umpires or referees, take rules they did not make and cannot change and apply them to the contest before them.

Neither judges nor umpires may first pick a winner and then manipulate the rules to produce that outcome.

Every American of a certain age remembers only too well the Olympic basketball game in which biased referees unfairly replayed the final seconds of the game so that the Soviets would win. And we all saw the tainted, colluding French ice skating judge at the last winter Olympics in Salt Lake City.

Neither judges nor umpires may allow their personal views of the parties or teams before them to influence their application of the law or the rules.

And they certainly may not prejudge the contest before the teams even take the field.

This role or function, this job description, must guide the hiring or selection process.

We hear it said, for example, that we must know a judicial nominee=s views. At least on the surface, that notion sounds practical, even common sense.

The problem is that, by itself, this general demand to know a nominee's views begs rather than answers the important questions.

It is so general that it simply cannot mean what it says. We have neither desire, need, nor right to know most of Judge Roberts=s views on most imaginable subjects.

The real questions are these: What views do we actually need to know? What views may we properly seek to know?

I submit, Mr. President, that properly understanding what judges do helps us properly establish which of a nominee's views we need to know.

This is quickly coming to a head.

Some of my friends on the other side of the aisle, aided in turn by some of their friends among left-wing interest groups, are demanding to know Judge Roberts=s views related to how he is likely to rule on certain issues.

They seek to elicit those views in a variety of different ways, and seem committed to ask carefully crafted questions designed to poke and prod, cajole and extract, but they are after the same thing.

Simply put, it appears that some of our Democratic colleagues want, in essence, Judge Roberts to prejudge issues and cases that might come before him.

It appears some Senators may even base their confirmation vote on his future judicial votes.

When Judge Roberts appears before the Judiciary Committee, I hope we will follow a standard, for both questions and answers, that is consistent with the nature of the judicial office and with Senate tradition.

The nature of the judicial office itself requires independence and impartiality. Nominees for judicial office, and especially those who are already sitting judges, must protect these essential elements of judicial character.

Many questions and answers will be consistent with judicial independence and impartiality, but others are not.

I have said before that Senators can ask any questions they choose, whether I disagree with those questions or not, whether I feel those questions are wise or not.

I have served on the Judiciary Committee during hearings for eight of the nine current Supreme Court Justices and more than 1400 lower court judges.

I know from experience that Senators want to know a great many things from a judicial nominee. Being legislators and being political, we may even want to know many political things.

I do, however, encourage my colleagues, and remind myself, to resist using a purely political standard to evaluate a nominee for judicial office.

Even more than Senators, however, the nominee before us will certainly use a judicial standard to answer even political questions.

Many of us have already met with Judge Roberts.

He is a thoughtful, sincere, and honest man.

We can be confident that he will do his best to balance the need to be forthcoming and responsive, on the one hand, with his commitment to judicial independence and impartiality, on the other.

There is, however, more for him to consider than simply that a Senator wants to know something.

Judge Roberts has not only been nominated to a judicial position, he already has one.

He will be on the federal bench, on one court or another, for many years to come.

Those who come before him deserve to know, need to know, that he is impartial. Nothing shatters that confidence more than knowing a judge has, under oath, already pledged to rule one way or another.

In fact, this duty not to prejudge issues or cases is so important that it is codified in the Canons of Judicial Ethics. Let me read a portion of it here:

"[A] judge or a candidate for…appointment to judicial office shall not…with respect to cases, controversies, <u>or issues</u> that are likely to come before the court, make

pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office."

I know that Judge Roberts takes his judicial responsibilities, his judicial ethics, very seriously.

Mr. President, we can look not only to the nature of the judicial office, but to past judicial confirmations, for more concrete definition of this judicial standard.

As each Supreme Court nominee came before the Judiciary Committee, Senators asked different kinds of questions on a wide range of issues. Some of them sought, more or less obviously, to zero in on how the nominee would likely rule in the future cases raising particular issues.

Senators of both parties pressed nominees of both parties.

The remarkable thing, which we will do well to keep in mind today, is the consistency with which nominees handled these questions. There were variations, to be sure, but those were variations in degree.

Nominees regularly took the same basic approach to the issue of prejudging issues and cases.

Let us look briefly at some examples from nominees of both parties.

Anthony Kennedy's nomination was sent by a Republican President to a Democratic Senate. At his confirmation hearing in January 1988, he said:

"the public expects that the judge will keep an open mind, and that he is confirmed by the Senate because of his temperament and his character, and not because he has taken particular positions on the issues."

The Senate confirmed Justice Kennedy by a vote of 97-0.

David Souter's nomination was also sent by a Republican President to a Democratic Senate. At his confirmation hearing in September 1990, he asked rhetorically:

"can you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States?"

The Senate confirmed Justice Souter by a vote of 90-9.

Ruth Bader Ginsburg's nomination was sent by a Democratic President to a Democratic Senate. At her confirmation hearing in July 1993, she gave what she called her rule when asked to prejudge issues or cases:

"no hints, no forecasts, no previews."

The Senate confirmed Justice Ginsburg by a vote of 96-3.

And finally, Stephen Breyer's nomination was sent by a Democratic President to a Democratic Senate. At his confirmation hearing in July 1994, he said:

"I do not want to predict or to commit myself on an open issue that I feel is going to come up in the Court….it is so important that the clients and the lawyers understand the judges are really open-minded."

The Senate confirmed Justice Breyer by a vote of 87-9.

I hope everyone sees the pattern here. Each of these Supreme Court nominees was, like Judge Roberts, already a federal appeals court judge.

Each of them, whether Republican or Democrat, used the same judicial standard when Senators, Republican or Democrat, sought prejudgment.

They refused.

These judicial nominees refused to prejudge issues or cases because it would compromise their own independence and impartiality.

They refused to prejudge issues or cases because litigants deserve confidence that the judge before whom they appear is impartial and open-minded.

Let me put back up here the simple, straightforward Ginsburg Rule.

No hints, no forecasts, no previews.

She was asked about her personal views on issues and precedents.

She was asked her judicial views on issues and cases.

She steadfastly refused.

Once again, the Ginsburg Rule is *no hints, no forecasts, no previews.*

I know that this way of balancing responsiveness to Senators with commitment to judicial independence and impartiality can be frustrating. But we confirmed her nomination overwhelmingly.

Let me be clear, Senators have the right to ask any questions they choose. I do hope that Senators, myself included, consider the absolute imperative of judicial independence and impartiality when we decide what questions to ask.

But we must realize, as we have in the past, that simply asking a question does not mean a judicial nominee should answer it.

Mr. President, I am concerned that some are already planning to change standards, to demand that Judge Roberts abandon the Ginsburg Rule.

Some have already released lists of questions they intend to ask this nominee.

Many of the questions ask, in various ways, how Judge Roberts will rule on issues. Many of these questions ask that he prejudge cases.

I am concerned that we might hear Senators demand that Judge Roberts sacrifice his independence and impartiality, that he violate his sense of judicial ethics, before they will vote for him.

I hope this does not happen.

This political standard would not only undermine judicial independence and impartiality, but it would be another radical departure from Senate tradition.

I hope we do not see it.

Some have also argued that the Senate allowed Justice Ginsburg to follow her *no hints, no forecasts, no previews* rule because she had already been on the appeals court for more than a decade.

This reasoning is faulty.

As I have described, Mr. President, the Ginsburg Rule is compelled by the judicial function itself, by the absolute imperative of judicial independence and impartiality.

This imperative exists whether someone had never before been a judge, been a judge for two weeks, or is a judicial veteran of 25 years.

So I believe we should have faith in this fine nominee to take his responsibility as a judge seriously.

And I firmly believe we should follow the standard that the judicial function compels and Senate tradition affirms.

Justice Ginsburg stated it as *no hints, no forecasts, no previews*.

We respected her and confirmed her.

We should do the same for Judge Roberts.

I yield the floor.

Senator McConnell, Floor Statement, 7/28/05

Just yesterday I expressed my concern that some may try to turn the confirmation process for Judge John Roberts into a political circus. After recent media reports I have become concerned that some of the fears that I spoke of earlier on this floor are coming true—namely, that our friends on the other side of the aisle are going to do everything they can to obstruct the confirmation process of the president's nominee to the Supreme Court.

Earlier, I spoke of a *Washington Post* article that outlined a carefully constructed plan of attack on the Roberts nomination. It was a three-staged battle plan. The first stage was to assert that the amount of consultation from the White House, no matter what the amount, was insufficient.

But that dog won't hunt. The White House consulted with over 70 Senators, including two-thirds of the Democratic caucus, and every Democrat on the Judiciary Committee. The President himself met with the Democratic leader, and the Democratic ranking member of the Judiciary Committee. He and his staff were receptive to any and all suggestions our Democratic friends cared to give. Frankly, Mr. President, he has done more than the Constitution requires by far, and more than his predecessors did. No one can say he did not consult the Senate, period. End of story.

The second salvo against the president's nominee, as told to the *Washington Post*, was to try to distort and destroy his record, and paint him as extreme. This plan, too, has failed.

Judge Roberts is one of the pre-eminent jurists of his generation. He is a top graduate of Harvard University and Harvard Law School. He was unanimously approved by the Senate for his current position on the U.S. Court of Appeals for the D.C. Circuit. Over 150 of his peers, Democrat and Republican alike, endorsed him for his current position. And he has argued before the Supreme Court 39 times, virtually more than any other member of the Supreme Court bar. He is clearly in the mainstream, is fair-minded, has a keen intellect, and a sterling record of integrity.

So now some of my Democratic friends, as some of us could have predicted, have come to the third and final stage of the attack plan. They are making unreasonable demands for documents about the nominee.

The Administration has been very generous in releasing documents from Judge Roberts's time in the Justice Department as a Special Assistant to Attorney General William French Smith, and his tenure in the White House Counsel's office.

The Judiciary Committee will receive some 70,000 pages of documents, at the behest of the Administration. Let me say that again—70,000 pages. I doubt that my colleagues have pored through those pages already, and yet they are that hungry for more.

Since the release of these documents, some in the media have hurriedly – some might say recklessly – skimmed document after complex legal document, looking for any hint of controversy so precious to the demands of the 24-hour news cycle.

In so doing, they run the risk of simplifying complex constitutional issues beyond recognition.

For example, during the past couple of days, there has been great deal of media attention regarding the arcane issue of so-called "court stripping," a shorthand term describing the issue of whether Congress has the authority to deny jurisdiction to federal courts.

The *New York Times* writes this morning that "Mr. Roberts consistently argued that courts should be stripped of authority of abortion, busing, school prayer and other matters."

The *Washington Post*, yesterday: "Roberts presented a defense of bills in Congress that would have stripped the Supreme Court of jurisdiction over abortion, busing and school prayer cases."
The *Boston Globe*: "One memo suggested that [Roberts] supported proposals in Congress to strip the federal courts of jurisdiction over abortion, busing and school prayer cases."

"Aha!" say our friends in the media. The media and some of our friends on the other side of the aisle suggest that John Roberts may have taken a position on these controversial issues.

The problem, Mr. President, is not that this is an oversimplification. The problem is that it's just plain wrong.

As a young attorney in the Justice Department, John Roberts was assigned to write a memo advocating that Congress had the constitutional authority to determine the appellate jurisdiction of the Supreme Court and other courts. This memo was written in response to legislation introduced in Congress proposing to strip federal jurisdiction on a number of controversial social issues.

Mr. Roberts was a constitutional scholar, and he did what constitutional scholars are frequently asked to do: Argue a legal theory about Congressional authority. Mr. Roberts was given this assignment by his boss, and he responded with the outstanding advocacy for which he is justly admired.

Making a legal argument, however, is miles away from endorsing the policy underlying the constitutional argument.

And as it turns out, Mr. President, John Roberts didn't think that "court stripping" was good policy in the first place.

Let me say again: John Roberts didn't think that "court stripping" was good policy in the first place.

The Associated Press reported yesterday that in 1985 "[A]s a lawyer in the Reagan White House, John Roberts wrote that Congress had authority to strip the Supreme Court of jurisdiction over cases involving school prayer and similar issues, but he added that 'such bills were bad policy and should be opposed'."

This tempest in a teapot over "court-stripping" refers to a position that Mr. Roberts had never agreed with in the first place.

That's the problem, Mr. President, with a rush to judgment on the complex legal documents that have been recently released. Instant media reports can muddy the waters by confusing a legal opinion with a policy position.

After all, Mr. President, half the story only conveys half the truth. And a half truth is frequently 100 percent wrong. I hope those in the media who got it wrong won't make the same mistake again.

This is the exact kind of misrepresentation I hope the Senate can avoid as it debates the Roberts nomination.

Mr. President, Judge Roberts deserves a fair and dignified process. The Senate needs to be thorough and deliberate but it must be fair.

So, Mr. President, I suggest we all take a deep breath and not rush to judgment in an effort to rush out tomorrow morning's headlines.

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